Office-Supreme Court, U.S.
FILED
SEP 11 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-2175

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CONTROL DATA CORPORATION, *et al.*, *Petitioners*,

v.

MALCOLM BALDRIGE, *et al.*, *Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY TO BRIEF FOR THE RESPONDENTS IN OPPOSITION

ELDON H. CROWELL
(Counsel of Record)
GEORGE D. RUTTINGER
PETER F. GARVIN, III
CROWELL & MORING
1100 Connecticut Ave., N.W.
Washington, D.C. 20036

ERWIN N. GRISWOLD
JONES, DAY, REAVIS & POGUE
1735 Eye Street, N.W.
Washington, D.C. 20006

Attorneys for Petitioners

Of Counsel:
ARNOLD & PORTER
1200 New Hampshire Ave., N.W.
Washington, D.C. 20036

FRIED, FRANK, HARRIS,
SHRIVER & KAMPELMAN
600 New Hampshire Ave., N.W.
Washington, D.C. 20037

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	i
REPLY TO BRIEF FOR THE RESPONDENTS IN OPPOSITION	1
CONCLUSION	7

TABLE OF AUTHORITIES

CASES:	Page
Abbott Laboratories v. *Gardner*, 387 U.S. 136	6
American Federation of Government Employees Local 1668 v. *Dunn*, 561 F.2d 1310 (9th Cir. 1977)	4
Arnold Tours, Inc. v. *Camp*, 400 U.S. 45	2, 3
Association of Data Processing Service Organizations, Inc. v. *Camp*, 397 U.S. 150	2-6
Barlow v. *Collins*, 397 U.S. 159	3
Investment Company Institute v. *Camp*, 401 U.S. 617	2, 3
Perkins v. *Lukens Steel Co.*, 310 U.S. 113	6
Rhode Island Committee on Energy v. *GSA*, 561 F.2d 397 (1st Cir. 1977)	4
Rusk v. *Cort*, 369 U.S. 367	6
STATUTES:	
Administrative Procedure Act, 5 U.S.C. § 702 (1976)	6
Brooks Act, Pub. L. No. 89-306, 79 Stat. 1127, 40 U.S.C. § 759 (1976)	1
Federal Property and Administrative Services Act of 1949, ch. 288, 63 Stat. 377 (codified in scattered sections of 40 and 41 U.S.C.)	1, 4
Service Contract Act, 41 U.S.C. § 351 (1976)	4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-2175

CONTROL DATA CORPORATION, *et al.*, *Petitioners,*

v.

MALCOLM BALDRIGE, *et al.*, *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY TO BRIEF FOR THE RESPONDENTS IN OPPOSITION

1. The Brief in Opposition reflects the confusion that currently prevails regarding this Court's zone of interests standing test. That test is concerned with comparing the interest asserted by the party seeking judicial review with the *interests* Congress intended to promote when it enacted the statute in question. Like the court below, the Opposition instead focuses on whether petitioners fall within a class of *persons* that Congress intended to protect.

As the court below found, petitioners have alleged injury to their interest in continuing to compete for federal computer contracts. (Pet. App. 25a; *see also id.* 92a.) The court below further determined that in enacting the statutes in question, the Brooks Act[1] and the Federal Property and Administrative Services Act of 1949,[2]

[1] Pub. L. No. 89-306, 79 Stat. 1127, 40 U.S.C. § 759 (1976).

[2] Ch. 288, 63 Stat. 377 (codified in scattered sections of 40 and 41 U.S.C.).

"Congress recognized maximization of competition as an important means to its objective [of promoting economic and efficient procurement of property]. 41 U.S.C. § 253(a) (1976) and H.R. Rep. No. 802, 89th Cong., 1st Sess. 25 (1965)." (Pet. App. 24a-25a.)[3] Petitioners therefore assert an interest that is "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150, 153.

The interpretation of the zone of interests test applied by the court below, and adopted by the Government in its Opposition (Br. in Opp. 4-7), mistakenly focuses the inquiry upon whether Congress intended to protect petitioners as computer manufacturers, and not upon whether Congress intended to advance the interest in competition for federal contracts. That the Government apparently shares the confusion of the court below regarding the proper interpretation of this Court's standing requirements argues forcefully that the Petition should be granted.

The Government attempts to buttress the analysis of the court below with edited quotations from *Data Processing* and its companion cases, *Arnold Tours, Inc.* v. *Camp*, 400 U.S. 45 and *Investment Company Institute* v. *Camp*, 401 U.S. 617. However, as noted in the Petition, there was no evidence in the language or legislative history of the banking statutes at issue in those cases that Congress intended to protect the bank competitors who sought judicial review. Rather, the banking statutes were

---

[3] The Government is thus incorrect in stating: "Petitioners appear to concede that the Brooks Act was not intended to protect the interests they assert. . . ." (Br. in Opp. 4).

intended to protect the interests of bank depositors. Nevertheless, this Court held that the bank competitors had standing because their interest in being free of competition from banks coincided with Congress' interest in preventing banks from competing in businesses that were not germane to their basic function. Thus, the bank competitors in *Data Processing, Arnold Tours,* and *Investment Company Institute* were not intended beneficiaries of the statutes in question, but were found to have standing.[4]

Petitioners' contention that a party need not be an intended beneficiary of the statute in question in order to have standing does not require that this Court abandon the zone of interests test or adopt "an alternative formulation of the test . . . that would limit the class of par-

---

[4] The Government states that the Court in *Investment Company Institute* "rejects Justice Harlan's contention in dissent that the statute in question was not intended to protect the competitors." (Br. in Opp. 6; citation omitted.) There is nothing in the Court's opinion that is inconsistent with Justice Harlan's conclusion that the bank competitors were not intended beneficiaries. Thus, it is more correct to say that the Court conferred standing upon the Petitioners *despite* Justice Harlan's conclusion that Congress did not intend to protect them. The Court's discussion of the zone of interests test shows that its focus was upon the interest asserted by the plaintiffs, and not their identities as parties (401 U.S. at 620):

> . . . [W]e concluded that Congress had arguably legislated against the competition that the Petitioners sought to challenge, and from which flowed their injury.

In *Barlow* v. *Collins,* 397 U.S. 159, the Court found that the legislative history of the statute in question evidenced a congressional intent to protect the interests of cash-rent farmers like the plaintiffs in that case. *Barlow* v. *Collins* thus indicates that an intended beneficiary who has suffered injury in fact does have standing. It cannot be read to restrict standing under the zone of interests test solely to intended beneficiaries of the statute at issue.

ties injured in fact by an administrative action who would have standing. . . ." (Br. in Opp. 7.) There are numerous cases in which parties have been denied standing because the interest they asserted was not related to or was in conflict with the interests that Congress sought to advance in passing the relevant statute. Thus, in *Rhode Island Committee on Energy v. GSA*, 561 F.2d 397 (1st Cir. 1977), a case relied upon by the Government (Br. in Opp. 8), the plaintiffs were denied standing under the zone of interests test because the relevant statute, the Federal Property and Administrative Services Act, was not intended to protect the aesthetic and environmental interests plaintiffs asserted. *Id.* at 401, 402. *See also American Federation of Government Employees Local 1668* v. *Dunn*, 561 F.2d 1310 (9th Cir. 1977), in which the interests of former government employees in continued employment bore no relation to the interests that Congress sought to protect in passing the Service Contract Act, 41 U.S.C. § 351 (1976), which was enacted to protect the interest in maintaining adequate labor standards in the private sector.

Petitioners rely upon the zone of interests test as articulated and applied by this Court in *Data Processing* and its progeny. The interpretation of this test by the court below would unduly restrict judicial review of unlawful agency action to only those parties who are intended beneficiaries of the statute in question, a result not contemplated or required by the *Data Processing* line of cases. This result is particularly troublesome in the context of this case, where the Government has stated that the challenged computer standards were intended to injure petitioners (*see* Pet. 6, n.7).

2. The Government asserts that the courts of appeals have consistently interpreted the zone of interests test as requiring that plaintiffs be intended beneficiaries of the relevant statute. (Br. in Opp. 7). This assertion is flatly contradicted by the decision of the court below, which repeatedly expressed puzzlement over the proper formulation of the zone of interests test and found nothing in the decisions of the courts of appeals that could dissipate its confusion. Indeed, the court below noted that its review of federal court decisions revealed "more variety than uniformity among the approaches to the zone test" and cited six court of appeals decisions that reached three completely disparate interpretations of the test. (Pet. 8.) The Government does not deny that there is disarray among the lower courts in the application of the zone of interests test, that the court below was confused over the proper interpretation of the test, or that this Court has not provided guidance regarding the proper interpretation of the test since the *Data Processing* line of cases, more than ten years ago. All of these factors are persuasive reasons for granting the Petition.

3. The Government apparently concedes that if petitioners are unable to obtain review of the standards at issue, the action of the Secretary of Commerce in promulgating the standards will be completely insulated from judicial review. (Br. in Opp. 9.) The Government reiterates the conclusion of the court below that Congress has been vigilant in overseeing the Commerce Department's computer standards-making program, and that petitioners should accordingly seek redress there. The Government thus overlooks the decisions of this Court holding that there is a strong presumption in favor of judicial review absent clear and convincing evidence of

a Congressional intent to preclude such review. *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 141, *citing Rusk* v. *Cort*, 369 U.S. 367, 380. There is no such "clear and convincing" evidence here, nor has the Government cited any. Thus, there is no basis for completely insulating the action of the Secretary of Commerce from judicial review.[5]

---

[5] In support of the contention that judicial review can be precluded in this case, the Government quotes from *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 137-38. (Br. in Opp. 10.) That case denied standing under procurement statutes to disappointed bidders for government contracts on the basis of the then-extant "legal rights" standing analysis, which was superceded by the passage of section 702 of the Administrative Procedure Act, 5 U.S.C. § 702 (1976) and by this Court's decision in *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150. The rationale of *Perkins* v. *Lukens Steel* was that the Court should not meddle in the day-to-day decision making of government procurement officials. Petitioners request no such judicial meddling in this case, but rather seek to challenge far reaching standards promulgated by the Secretary of Commerce that affect all federal procurements of computer equipment and that were promulgated, petitioners alleged, without valid statutory authority, without adequate support in the administrative record, and in violation of the requirements of the Administrative Procedure Act.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

ELDON H. CROWELL
(Counsel of Record)
GEORGE D. RUTTINGER
PETER F. GARVIN, III
CROWELL & MORING
1100 Connecticut Ave., N.W.
Washington, D.C. 20036
202-452-5800

ERWIN N. GRISWOLD
JONES, DAY, REAVIS & POGUE
1735 Eye Street, N.W.
Washington, D.C. 20006
Attorneys for Petitioners

Of Counsel:
ARNOLD & PORTER
1200 New Hampshire Ave., N.W.
Washington, D.C. 20036

FRIED, FRANK, HARRIS,
SHRIVER & KAMPELMAN
600 New Hampshire Ave., N.W.
Washington, D.C. 20037

Dated: September 11, 1981